

No. 47929-0-II
(consolidated case)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ERIC MICHAEL ELLISER,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-04905-0
The Honorable Jack Nevin, Judge

OPENING BRIEF OF APPELLANT ERIC MICHAEL ELLISER

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TABLE OF CONTENTS

I.	SUMMARY OF THE CASE.....	1
II.	ASSIGNMENTS OF ERROR.....	2
III.	ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.....	3
IV.	STATEMENT OF THE CASE.....	5
	A. PROCEDURAL HISTORY.....	5
	B. SUBSTANTIVE FACTS	6
V.	ARGUMENT & AUTHORITIES	15
	A. THE STATE FAILED TO MEET ITS CONSTITUTIONAL BURDEN OF PROVING ALL OF THE ELEMENTS OF SECOND DEGREE MURDER AND FIRST DEGREE ASSAULT.....	15
	1. <u>The State failed to prove that Elliser acted as McKittrick's accomplice because there was no evidence that he knew McKittrick planned to assault Wagner and no evidence that he aided, assisted, or encouraged McKittrick.</u>	17
	2. <u>The State failed to prove that Elliser personally committed first degree assault because the evidence that a second assault actually occurred is extremely speculative and there was no evidence that Elliser committed the supposed assault.</u>	20
	B. ELLISER'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED WHEN THE STATE FAILED TO ELECT WHICH ACT IT WAS RELYING ON TO PROVE FIRST DEGREE ASSAULT, AND WHEN THE TRIAL COURT FAILED TO GIVE THE JURY A UNANIMITY INSTRUCTION.....	22

C. THE TRIAL COURT ERRED IN ADMITTING MINIMALLY PROBATIVE BUT UNFAIRLY PREJUDICIAL EVIDENCE OF SKINHEAD VALUES AND ELLISER'S AFFILIATION WITH A SKINHEAD GROUP.	25
D. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.	30
VI. CONCLUSION	32

TABLE OF AUTHORITIES

CASES

<u>City of Tacoma v. Luvene</u> , 118 Wn.2d 826, 827 P.2d 1374 (1992)	16
<u>Dawson v. Delaware</u> , 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992)	27
<u>In re Wilson</u> , 91 Wn.2d 487, 588 P.2d 1161 (1979)	18, 20
<u>State v. Bennett</u> , 36 Wn. App. 176, 672 P.2d 772 (1983)	26
<u>State v. Berube</u> , 150 Wn.2d 498, 79 P.3d 1144 (2003)	18
<u>State v. Campbell</u> , 78 Wn. App. 813, 901 P.2d 1050 (1995)	27
<u>State v. Castro</u> , 32 Wn. App. 559, 648 P.2d 485 (1982)	18
<u>State v. Coleman</u> , 159 Wn.2d 509, 150 P.3d 1126 (2007)....	22-23
<u>State v. Crane</u> , 116 Wn.2d 315, 804 P.2d 10 (1991)	24
<u>State v. Halstien</u> , 122 Wn.2d 109, 857 P.2d 270 (1993)	25
<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996)	17
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998)	17
<u>State v. Holland</u> , 77 Wn. App. 420, 891 P.2d 49 (1995)	23
<u>State v. King</u> , 75 Wn. App. 899, 878 P.2d 466 (1994)	24
<u>State v. Kiser</u> , 87 Wn. App. 126, 940 P.2d 308 (1997)	23
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988)	22
<u>State v. Laureano</u> , 101 Wn.2d 745, 682 P.2d 889 (1984)	26

<u>State v. McBride</u> , 74 Wn. App. 460, 873 P.2d 589 (1994)	27
<u>State v. Monschke</u> , 133 Wn. App. 313, 135 P.3d 966 (2006)	28
<u>State v. Nolan</u> , 141 Wn.2d 620, 8 P.3d 300 (2000)	30, 31
<u>State v. Ortega–Martinez</u> , 124 Wn.2d 702, 881 P.2d 231 (1994)	22
<u>State v. Parker</u> , 60 Wn. App. 719, 806 P.2d 1241 (1991)	18, 20
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995)	25
<u>State v. Rotunno</u> , 95 Wn.2d 931, 631 P.2d 951 (1981)	18, 20
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	16, 17
<u>State v. Saltarelli</u> , 98 Wn.2d 358, 655 P.2d 697 (1982)	25-26
<u>State v. Scott</u> , 151 Wn. App. 520, 213 P.3d 71 (2009)	25, 28
<u>State v. Sibert</u> , 168 Wn.2d 306, 230 P.3d 142 (2010)	23
<u>State v. Sinclair</u> , 192 Wn. App. 380, 367 P.3d 612 (2016)	32
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.2d 951 (1986)	25
<u>State v. Tharp</u> , 27 Wn. App. 198, 616 P.2d 693 (1980)	27
<u>United States v. Roark</u> , 924 F.2d 1426 (8th Cir. 1991)	28

OTHER AUTHORITIES

ER 403	26
ER 404	25
RAP 2.5	23
RAP 14.2	30

RAP 15.2	32
RCW 9A.08.020	18
RCW 9A.32.050	16
RCW 9A.36.011	16
RCW 10.73.160	30

I. SUMMARY OF THE CASE

Derek Wagner died as a result of a stab wound inflicted by Shane McKittrick. The State alleged that McKittrick was angry at Wagner because Wagner had been sleeping with the wife of McKittrick's good friend Mark Stredicke. The State charged McKittrick with intentional murder, felony murder and assault. The State alleged that Stredicke was an accomplice because he directed McKittrick to commit the assault that resulted in Wagner's death. The State originally alleged that Eric Elliser was an accomplice to felony murder and assault because he was present and assisted McKittrick. But mid-way through trial the State posited a new theory--that Elliser was a principle to the assault because he tracked down and stabbed Wagner after McKittrick's assault was completed. All four men were members of skinhead groups, so the State presented testimony that the rules of skinhead culture required that Wagner be assaulted for having an affair with a fellow skinhead's wife. The jury found McKittrick not guilty of intentional murder and found Stredicke not-guilty on all counts, thus rejecting the charges that required the jury to find that the men pre-planned or coordinated the assault or that McKittrick intended to kill Wagner. But the jury found Elliser guilty of second degree felony murder

(with an assault predicate) and first degree assault (assault with a deadly weapon).

II. ASSIGNMENTS OF ERROR

1. The State failed to meet its constitutional burden of proving beyond a reasonable doubt that Eric Elliser acted as an accomplice to second degree murder.
2. The State failed to meet its constitutional burden of proving beyond a reasonable doubt that Eric Elliser acted as an accomplice to first degree assault.
3. The State failed to meet its constitutional burden of proving beyond a reasonable doubt that Eric Elliser committed first degree assault.
4. Eric Elliser was denied his constitutional right to a unanimous jury verdict.
5. The trial court erred when it failed to instruct the jury that it must be unanimous as to which act established the elements of first degree assault.
6. The trial court erred in admitting minimally probative but unfairly prejudicial evidence of skinhead values and Eric Elliser's affiliation with skinhead groups under ER 404(b).
7. Any future request by the State for appellate costs should be

denied.

III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the State fail to meet its constitutional burden of proving beyond a reasonable doubt that Eric Elliser acted as an accomplice to second degree murder and first degree assault, where there was no evidence that Elliser helped plan or knew ahead of time that Shane McKittrick planned to assault Derek Wagner, and where there was no evidence that Elliser actually aided, assisted or encouraged McKittrick? (Assignments of Error 1 & 2)
2. Did the State fail to meet its constitutional burden of proving beyond a reasonable doubt that Eric Elliser personally committed first degree assault, where the evidence that a second assault actually occurred is extremely speculative, and where no witnesses testified that Elliser was anywhere near Derek Wagner at the time the supposed second assault would have occurred or that Elliser was armed with a knife at any point on the night of the incident? (Assignment of Error 3)
3. Was Eric Elliser denied his constitutional right to a unanimous jury verdict where the State presented evidence

of two separate acts to support the first degree assault charge and argued to the jury that Elliser could be found guilty based on either act, and where there was insufficient evidence to establish one or both acts, and where the trial court failed to instruct the jury that it must be unanimous as to which act established the elements of first degree assault? (Assignments of Error 4 & 5)

4. Where evidence of skinhead values and of Eric Elliser's skinhead affiliation was not necessary to establish a motive for the crime, did the trial court err in admitting the evidence under ER 404(b)? (Assignment of Error 6)
5. Did the trial court err in admitting evidence of skinhead values and of Eric Elliser's skinhead affiliation where any probative value was minimal and where the potential for prejudice was extremely high? (Assignment of Error 6)
6. If the State substantially prevails on appeal and makes a request for costs, should this Court decline to impose appellate costs because Eric Elliser does not have the ability to pay costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances? (Assignment of Error 7)

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Eric Michael Elliser as an accomplice to the crimes of murder in the second degree (RCW 9A.32.050(1)(b) and assault in the first degree (RCW 9A.36.011(1)(a)), in connection with the stabbing death of Derek Wagner. (CP 64-65) The State alleged that Elliser or an accomplice was armed with a deadly weapon (a knife) during the commission of the offenses. (CP 64-65) Elliser was tried with two co-defendants, Mark Stredicke and Shane McKittrick. The State alleged that McKittrick acted with premeditated intent to kill Wagner or alternatively that he assaulted and caused the death of Wagner, and that Stredicke was an accomplice because he directed or requested that McKittrick assault Wagner. (CP 252, 255, 258, 267, 269, 271; McKittrick CP 12-13; 04/21/15 RP 25-26, 31-34, 42, 55, 76)¹

Over defense objection, the State was allowed, through the testimony of lay and expert witnesses, to present evidence that the defendants were members of a skinhead organization and that skinheads resolve conflict and rule violations with violence.

¹ The transcripts in this case will be referred to by the date of the proceeding.

(01/30/15 RP 86-89; 01/23/15 RP 145-54; 03/02/15 RP 11-19; 03/03/15 RP 142-48)

The jury found Elliser guilty of both charges. (04/28/15 RP 29; CP 292-93) The jury found McKittrick not guilty of premeditated murder but guilty of manslaughter and second degree murder, and found Stredicke not guilty on all charges. (04/28/15 RP 27-28, 29-30; McKittrick CP 89-92)

At sentencing, the trial court vacated and dismissed Elliser's assault conviction on double jeopardy grounds. (08/21/15 RP 87; CP 414) The court found that Elliser was a persistent offender, and imposed a sentence of life without parole. (08/21/15 RP 80; CP 417) This appeal timely follows. (CP 423)

B. SUBSTANTIVE FACTS

Derek Wagner served time in prison and was released in the fall of 2013. (03/11/15 RP 19) He soon began a sexual relationship with a woman named Erin Cochran. (03/11/15 RP 22-23) But when Wagner learned that Cochran was married, he was upset and decided to stop sleeping with her until after her pending divorce was finalized. (03/11/15 RP 25-27, 03/18/15 RP 72)

Cochran's husband at the time was Mark Stredicke. (03/16/15 RP 70; 03/18/15 RP 60-61) Stredicke and his friends,

Jeffrey Cooke, Shane McKittrick, and Eric Elliser are associated with skinhead groups. (03/16/15 RP 44, 45-47; 03/18/15 RP 58-59) Wagner is also a skinhead, but was not close friends with the other men. (03/18/15 RP 57, 58; 03/17/15 RP 7, 16) Evidence was presented at trial that a skinhead might be punished and beaten up by other skinheads if he breaks a "rule" of skinhead culture or if he does something viewed as disrespectful to another skinhead. (03/18/15 RP 92; 03/19/15 RP 70-71)

Wagner planned to spend the weekend of November 15-17, 2013, visiting with another skinhead friend, Joshua Loper, who had also recently been released from prison. (03/16/15 RP 41, 44) Cooke, who benefited significantly from a plea agreement with the State, testified that he wanted to meet with Wagner and Loper to discuss skinhead business, and to see how they were transitioning back into the community. (03/18/15 RP 63, 64-65, 66, 68, 69) The three men spent the afternoon of November 16 drinking together at Loper's house. (03/16/15 RP 62, 67)

Because Loper had to work a graveyard shift, Cooke and Wagner eventually went to Cooke's house, where they continued drinking. (03/16/15 RP 68, 72, 73; 03/18/15 RP 71, 76) Elliser,

Matthew Wright, and Michelle McKittrick arrived later.² Cooke testified that Elliser and Wagner met and shook hands, and everything seemed fine between the two of them even though Wagner had slept with the wife of Elliser's friend. (03/18/15 RP 77, 78-79)

The group eventually went to the house that Elliser shared with Michelle, and continued drinking. (03/17/15 RP 19, 18; 03/18/15 RP 80, 81, 83-84) Shane McKittrick arrived soon after with his girlfriend Melissa Bourgault. (03/18/15 RP 84) At first everyone seemed to be getting along, but Wagner eventually became very drunk and obnoxious, calling McKittrick a punk and trying to goad him into fighting. (03/17/15 RP 94-95, 99)

At some point during the party, Cooke had a telephone conversation with Stredicke. Stredicke was upset because Cooke was hanging out with Wagner, the man who slept with his wife. (03/18/15 RP 86-87) Cooke testified that McKittrick was also upset about Wagner's presence. (03/18/15 RP 87-88) McKittrick and Wagner began arguing about the fact that Wagner had "slept with a

² Michelle is Shane McKittrick's sister. (04/16/15 RP 115) Michelle will be referred to by her first name, and Shane will be referred to as McKittrick.

comrade's wife.”³ (03/18/15 RP 89)

Cellular phone records show calls between the men that night, and text messages sent between McKittrick and Stredicke. (03/25/15 RP 119; 04/13/15 RP 75-76; Exhs. P218, P232, P259A-261A) First McKittrick asks Stredicke “what’s what?” (04/13/15 RP 75; Exhs. P218, P232) But Stredicke responds, “don’t fuck with the dude, I’ll catch him.” (04/13/15 RP 75; Exhs. P218, P232)

But McKittrick was still upset, and was yelling about wanting to fight with Cooke because he was supporting Wagner. (03/18/15 RP 114, 117) McKittrick handed a phone to Cooke so he could talk to Stredicke again. Cooke told Stredicke he did not think there was any reason to fight Wagner because Wagner had not known that Cochran was married, and when he found out he stopped seeing her. (03/18/15 RP 119, 120) According to Cooke, however, McKittrick insisted they fight Wagner over the issue. (03/18/15 RP 120-21)

McKittrick took issue with Cooke’s defense of Wagner and decided he wanted to fight Cooke. (03/18/15 RP 114, 117, 120) Cooke usually carries a knife in a sheath on his belt. (03/18/15 RP

³ “Comrade” is a term that skinheads use to refer to fellow skinheads. (03/17/15 RP 78; 04/14/15 RP 30)

93) But he did not want to be armed if he was going to fight McKittrick, so he took off the sheath and knife and threw them on the ground. (03/18/15 RP 94, 120-21) Elliser intervened before Cooke and McKittrick could start fighting. (03/17/15 RP 115; 03/18/15 RP 120-21, 122)

When Wagner picked up Cooke's knife, Bourgault yelled at him to leave it on the ground. (03/18/15 RP 121; 03/17/15 RP 29-30) Wagner told her to "shut up" and called her a vulgar name. (03/18/15 RP 121; 03/17/15 RP 28-29, 31) Wagner kept the knife and sheath, and walked to Cooke's car. (03/18/15 RP 94, 122-23) McKittrick was angry that Wagner was disrespectful to his girlfriend. (03/18/15 RP 121-22; 03/17/15 RP 31) But Elliser, who did not want any problems or fighting to occur, tried to keep the peace. (03/18/15 RP 124-25)

Cooke, Wagner and a third man, Matthew Wright, got into Cooke's car and left. (03/18/15 RP 125; 03/19/15 RP 6) A few blocks away, Cooke noticed McKittrick's car coming up behind them with its high-beams on. (03/18/15 RP 6) Wagner told Cooke to pull over because he was ready to fight and was "not afraid" of McKittrick. (03/18/15 RP 7-8) According to Cooke, Wagner even grabbed the steering wheel in an effort to get Cooke to stop the car.

(03/23/15 RP 7) Immediately after Cooke stopped the car, Wagner grabbed the knife, put it into his pants, and got out. (03/19/15 RP 9; 03/23/15 RP 8)

According to Cooke, Wagner and McKittrick began yelling and circling each other in fighting stances. (03/19/15 RP 11) Elliser then pulled up in his car. (03/19/15 RP 12) Wagner tells Elliser to “get your boy,” referring to McKittrick, but Elliser responded “you lied to me bitch.” (03/19/15 RP 12) Cooke testified that Elliser moved from his car towards Wagner and McKittrick and “went to go grab him or something.” (03/19/15 RP 14) Cooke did not clarify who Elliser tried to grab or for what purpose.

Cooke heard McKittrick say “what’s in your hand?” and “put it down,” and then heard Wagner yell that he had been stabbed. (03/19/15 RP 18, 20; 03/23/15 RP 8-9, 10) Cooke saw Wagner run away and heard McKittrick say “I stuck him.” (03/19/15 RP 18) Cooke testified that Wagner did not seem seriously injured when he ran away, and nobody immediately tried to stop him or chase him. (03/19/15 RP 20-21; 03/23/15 RP 11)

Wright’s version of events was different. He also heard Wagner tell Cooke to stop the car so he could fight McKittrick. (03/17/15 RP 34-35) But he testified that Wagner and McKittrick

began to fight once they were out of the cars, and that Wagner fell to the ground once and McKittrick stood back and allowed him to get back up. (03/17/15 RP 40-41) Wright heard McKittrick yell that Wagner was “trying to grab a knife.” (03/17/15 RP 44) Then he saw Wagner run across the street, and heard McKittrick say “I just stabbed him.” (03/17/15 RP 42, 44) According to Wright, Elliser arrived in his car after Wagner ran away. (03/17/15 RP 42, 44, 117) But Wright also testified that nobody tried to run after or catch Wagner. (03/18/15 RP 52-53)

Private surveillance video from a neighbor’s residence shows Cooke’s car stop by the intersection of South 45th Street and South Asotin Street, and shows McKittrick’s car arrive a few seconds later. People can be seen moving around the cars. (03/12/15 RP 94-95; 04/14/15 RP 165, 04/15/15 91-92, 96; Exh. P239) About a minute and a half later, Elliser’s car can be seen pulling up to the scene. (04/15/15 RP 91-92; Exh. P239) The video does not show whether Elliser got out of the car. (04/15/15 RP 97; Exh. P239) The brake lights from Elliser’s car can be seen flickering, then 38 seconds later can be seen flickering again, indicating that at the most Elliser was out of his car for just those 38 seconds. (04/15/15 RP 96-97; Exh. P239)

Wright and Cooke testified that they looked for Wagner after the incident because they were concerned and wanted to make sure he was not critically injured. (03/17/15 RP 45; 03/19/15 RP 21-22, 25-26) Cooke also wanted to find his knife, so he and Wright walked around the neighborhood looking for it. (03/19/15 RP 23, 24, 26)

Telephone records also show that Stredicke and Elliser spoke shortly after the incident. (03/25/15 RP 103, 110; Exh. P129A) The surveillance video shows Elliser's and Cooke's cars circling the neighborhood after the initial stabbing. (04/14/15 RP 167-68; 04/15/15 RP 24; Exh. P239) Cooke and Wright can also be seen on foot walking on South Asotin Street, then disappearing from frame before reappearing again. (04/14/15 RP 172-73; Exh. P239) At one point, Elliser, Cooke and Wright stop to discuss what happened. According to Cooke, Elliser said that "it wasn't supposed to go like that." (03/19/15 RP 23, 67)

Winter Mimura lives on South Asotin Street, a short distance from the intersection where Wagner was stabbed. (03/11/15 RP 89) He and his wife did not hear or notice any strange activity on the night and early morning of November 16-17, and their dog did not alert them to any intruders on their property. (03/11/15 RP 100,

107) Mimura was in his backyard several times on the morning of November 17 and, other than a slightly bent bar on his cyclone fence and an open gate on his side yard, did not notice anything unusual. (03/11/15 RP 90-91, 92, 94, 98-99) But that afternoon he saw Wagner's body lying on the ground towards the back of the yard. (03/11/15 RP 91) He immediately called the police. (03/11/15 RP 91)

Tacoma Police officers arrived and secured the scene. (03/11/15 RP 73, 76, 78; 03/16/15 RP 14) Wagner was lying face up on the ground, and had been dead for several hours. (03/11/15 RP 76, 82; 04/13/15 RP 13-14) Officers found Cooke's knife sheath under Wagner's body. (03/12/15 RP 41) They also canvassed the neighborhood and found Cooke's knife on the ground near the intersection of South 45th Street and South Asotin Street. (03/11/15 RP 80; 03/12/15 RP 55; 03/16/15 RP 18)

Wagner had been stabbed three times in the abdomen. (03/25/15 RP 161-63) The medical examiner was not certain in which order the wounds were inflicted, but noted that one wound in particular would have been fatal within minutes, and that fatal wound appeared to have been inflicted before at least one of the other wounds. (03/25/15 RP 160, 165-66; 03/26/15 RP 63, 66, 82)

He believed this because there was no pooling of blood around one of the wounds, indicating that Wagner's blood pressure had already dropped dramatically as a result of the earlier fatal wound. (03/26/15 RP 62, 63) He could not say exactly how much time passed between when the fatal wound and any subsequent stab wounds were inflicted, but opined it was likely at least one minute. (03/26/15 RP 63, 66-67, 85)

Cooke testified that Stredicke called him the next morning demanding to know if Wagner was at his house. (03/19/15 RP 45, 48) Cooke, Elliser, McKittrick and Stredicke saw each other later that day and discussed what happened. (03/19/15 RP 45-46; 03/25/15 RP 138) They all seemed to be under the impression that Wagner was alive but in hiding. (03/19/15 RP 46-47, 48) But later, Cooke saw police cars and evidence tape in the area where the incident occurred and learned that Wagner had died. (03/19/15 RP 47)

V. ARGUMENT & AUTHORITIES

A. THE STATE FAILED TO MEET ITS CONSTITUTIONAL BURDEN OF PROVING ALL OF THE ELEMENTS OF SECOND DEGREE MURDER AND FIRST DEGREE ASSAULT.

The State charged Elliser with one count of second degree felony murder and one count of first degree assault. (CP 64-65) A

person is guilty of second degree felony murder if, as charged in this case, “[h]e or she commits or attempts to commit any felony, including assault ... and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants[.]” RCW 9A.32.050(1)(b). “A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm ... [a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.” RCW 9A.36.011(1)(a).

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvane, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119

Wn.2d at 201.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

In this case, the State failed to prove that Elliser acted as an accomplice to second degree murder or first degree assault, or that he acted as the principle to first degree assault.⁴

1. The State failed to prove that Elliser acted as McKittrick's accomplice because there was no evidence that he knew McKittrick planned to assault Wagner and no evidence that he aided, assisted, or encouraged McKittrick.

The State contended that McKittrick assaulted Wagner with a knife at the intersection of South 45th Street and South Asotin Street, and that one of the stab wounds inflicted by McKittrick caused Wagner's death. (04/21/15 RP 25-26, 42, 76) The State asserted that Elliser was an accomplice to McKittrick during this assault. (CP 64-65; 04/21/15 RP 49) This assault formed the

⁴ In the event that Elliser's murder conviction is reversed in this or a future appeal, the State may try to revive the dismissed first degree assault conviction. Therefore, challenges to that conviction are included in this brief and are not moot.

factual basis for both the second degree murder and the first degree assault charges. (CP 64-65; 04/21/15 RP 49)

To convict a defendant as an accomplice, the State must prove that the defendant, “with knowledge that it will promote or facilitate the commission of the crime,” solicited, commanded, encouraged, or requested another person to commit the crime, or aided or agreed to aid another person in planning or committing the crime. RCW 9A.08.020(3)(a); State v. Berube, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003). Physical presence and awareness of the criminal activity alone are insufficient to establish accomplice liability. State v. Parker, 60 Wn. App. 719, 724-25, 806 P.2d 1241 (1991); In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979); State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981).

Rather, the State must prove that the defendant was ready to assist the principal in the crime and that she shared in the criminal intent of the principal, thus “demonstrating a community of unlawful purpose at the time the act was committed.” State v. Castro, 32 Wn. App. 559, 564, 648 P.2d 485 (1982); see also Rotunno, 95 Wn.2d at 933; Wilson, 91 Wn.2d at 491. In this case, the State did not establish that Elliser was an accomplice to the assault committed by McKittrick.

There was no evidence that Elliser was involved in any conversations with Stredicke or McKittrick or any other skinhead about whether or not to fight Wagner because of his affair with Cochran. There was no evidence that Elliser felt that Wagner should be punished. There was no evidence that Elliser knew, when McKittrick drove after Cooke, that he intended to fight or assault Wagner or Cooke. And in fact, the evidence showed that Elliser acted as peacemaker several times that night, including when Cooke and McKittrick began fighting at his house just before the final incident. (03/17/15 RP 115; 03/18/15 RP 122, 124-25)

The evidence also showed that Elliser arrived at the intersection after McKittrick and Wagner had already exited their respective cars and began their confrontation. (03/17/15 RP 117; 03/19/15 RP 12; 03/23/15 RP 84) At this point, Wagner was a willing participant in the fight.⁵ According to Cooke, Elliser declined Wagner's request to control McKittrick and accused Wagner of lying. (03/19/15 RP 12) Elliser's decision not to stop their fight does not make him an accomplice. His mere presence and acquiescence does not rise to the level of being an accomplice.

⁵ Wagner told Cooke to pull over because he wanted to fight McKittrick. (03/19/15 7-8; 03/23/15 RP 7)

Parker, 60 Wn. App. at 724-25; Wilson, 91 Wn.2d at 491; Rotunno, 95 Wn.2d at 933.

If Cooke is to be believed, the most Elliser did is try to “grab him or something.” (03/19/15 RP 14) Cooke does not say who Elliser tried to grab or for what purpose. It is not clear from Cooke’s testimony whether Elliser was trying to grab one of the men to end the fight, thus continuing his earlier efforts to be a peacemaker, or whether he was in fact trying to assist McKittrick in assaulting Wagner. This vague evidence cannot establish, beyond a reasonable doubt, that Elliser intended to or actually assisted and aided McKittrick.

The State failed to prove that Elliser acted as an accomplice to McKittrick, and his murder and assault convictions must be reversed and dismissed with prejudice.

2. The State failed to prove that Elliser personally committed first degree assault because the evidence that a second assault actually occurred is extremely speculative and there was no evidence that Elliser committed the supposed assault.

The State argued in the alternative that Elliser was guilty of first degree assault because he personally went into the Mimuras’ back yard and stabbed Wagner in the abdomen as he lay dying on the grass. (04/21/15 RP 48-49) While this is an imaginative theory,

there was insufficient evidence to support it.

The State's theory rested on the following evidence and conjecture: (1) the crossbar of the Mimura fence was bent and the gate was also left open, so two people must have entered the yard; (2) at least a minute passed between when the fatal wound was inflicted and when the final wound was inflicted, so there must have been a second assault; (3) Wagner was found lying in an awkward position so he must have been rolled over by someone; and (4) car headlights can be seen near the Mimura house when Elliser was still driving around the neighborhood, so Elliser must have been the perpetrator. (04/19/15 RP 35-37, 37, 48-49, 73)

However, not a single witness testified that they saw or heard a second person enter the Mimura yard. Not a single witness testified that Elliser was anywhere near the Mimura house after Wagner was stabbed by McKittrick. Not a single witness testified that Elliser had a knife at any time that night. There was no blood on the bent fence crossbar and no signs of a struggle in the yard. (04/14/15 RP 96-97) And Cooke and Wright were also still driving around the neighborhood at that time, and had even gotten out of Cooke's car to look for Wagner and for Cooke's knife. (03/19/15 RP 23, 24, 26)

Even if the State's theory--that someone was able to track Wagner into the Mimura's dark backyard without waking the family or the dog, find Wagner on the ground, roll him over and stab him as he lay dying--is to be believed, there is simply not enough evidence to prove beyond a reasonable doubt that it was Elliser who did so. This theory is not supported by sufficient proof beyond a reasonable doubt and Elliser's first degree assault conviction must be dismissed with prejudice.

B. ELLISER'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED WHEN THE STATE FAILED TO ELECT WHICH ACT IT WAS RELYING ON TO PROVE FIRST DEGREE ASSAULT, AND WHEN THE TRIAL COURT FAILED TO GIVE THE JURY A UNANIMITY INSTRUCTION.

"Criminal defendants in Washington have a right to a unanimous jury verdict." State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). For a criminal defendant's conviction to be constitutionally valid, a unanimous jury must conclude that the accused committed the criminal act charged. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Accordingly, when the State presents evidence of multiple acts that could each form the basis of one charged crime, "either the State must elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act." State v. Coleman, 159 Wn.2d

509, 511, 150 P.3d 1126 (2007). This requirement “assures a unanimous verdict on one criminal act” by “avoid[ing] the risk that jurors will aggregate evidence improperly.” Coleman, 159 Wn.2d at 512.⁶

In this case, the State argued two different factual scenarios to support the first degree assault charge against Elliser:

Now, the last charge that we’ll talk about is the charge of assault in the first degree....

There is stab wound number two, deep into the chest of Derek Wagner, a matter of minutes after stab wound number one. So, certainly, Eric Michael Elliser could have been found or -- can be found guilty of this crime because he stuck the knife into Derek Wagner’s chest, himself, in-person, in the backyard, after Derek Wagner had fled from the scene.... That’s one sense in which Eric Michael Elliser could be guilty of assault in the first degree.

The other offense is, again, the same as with felony murder as an accomplice. That he is an accomplice to Shane McKittrick doing the first stabbing....

So, either/or, either as an accomplice or in-person, Eric Elliser can be found guilty of first degree assault.

(04/21/15 RP 48-49)

Thus, the jury was presented with two possible acts to

⁶ Alleged instructional errors are reviewed de novo. State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). And this issue may be raised for the first time on appeal because failure to provide a unanimity instruction in a multiple acts case amounts to manifest constitutional error. RAP 2.5(a); State v. Kiser, 87 Wn. App. 126, 129, 940 P.2d 308 (1997); State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

support the assault charge. But the instructions did not inform the jury that it must be unanimous as to which act they were relying on to find Elliser guilty of assault. The jury received no unanimity instruction. And the prosecutor clearly did not elect which act it was relying on for this charge.

If there is no election and no instruction, the resulting constitutional error is harmless only if no rational trier of fact could have had a reasonable doubt that each incident established the crime beyond a reasonable doubt. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991). The rationale for this protection in multiple acts cases stems from possible confusion regarding which of the acts a jury has used to determine a defendant's guilt. State v. King, 75 Wn. App. 899, 902, 878 P.2d 466 (1994).

A rational trier of fact could have had a reasonable doubt that Elliser acted as an accomplice to McKittrick's assault and could have had a reasonable doubt that Elliser stabbed Wagner himself. In fact, as argued in detail above, there is a serious lack of evidence that either one of these acts occurred. Accordingly, the error in omitting a unanimity instruction is not harmless, and this error also requires that Elliser's assault conviction be reversed.

C. THE TRIAL COURT ERRED IN ADMITTING MINIMALLY PROBATIVE BUT UNFAIRLY PREJUDICIAL EVIDENCE OF SKINHEAD VALUES AND ELLISER'S AFFILIATION WITH A SKINHEAD GROUP.

Under ER 404(b), evidence of other crimes, wrongs or acts is not admissible to prove a defendant's character or propensity to commit crimes, but may be admissible for other purposes, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Bad acts under ER 404(b) include "acts that are merely unpopular or disgraceful." State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (quoting 5 K. Tegland, WASH. PRACT., EVIDENCE § 114 at 383-84 (3rd ed. 1989)); see eg. State v. Scott, 151 Wn. App. 520, 526-27, 213 P.3d 71 (2009) (admission of gang evidence measured under the standards of ER 404(b)).

Before such evidence may be admitted, the trial court must first identify the purpose for which the evidence is being admitted. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Next, the court must determine that the proffered evidence is logically relevant to prove a material issue. Powell, 126 Wn.2d at 262. The test is whether such evidence is relevant and necessary to prove an essential fact of the crime charged. State v. Saltarelli, 98 Wn.2d

358, 362, 655 P.2d 697 (1982); State v. Laureano, 101 Wn.2d 745, 764, 682 P.2d 889 (1984). Evidence is logically relevant if it tends to make the existence of the identified fact more or less probable. Saltarelli, 98 Wn.2d at 361-62.

Finally, assuming the evidence is logically relevant, the court must determine whether its probative value outweighs any potential prejudice. Saltarelli, 98 Wn.2d at 362-63; State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983); ER 403.

Over defense objection, the State was allowed to elicit evidence that the participants in this incident, including Elliser, are members of skinhead groups. (01/20/15 RP 86-89; 03/02/15 RP 14-19; 03/26/15 RP 30-45; 04/13/15 RP 124-32) To become a skinhead, one must pledge loyalty to other skinheads and must follow codes and principles of behavior. A skinhead who breaks a rule or who acts in a way that harms or disrespects another skinhead faces punishment from other skinheads, sometimes in the form of physical violence. (03/19/15 RP 70-71; 04/14/15 RP 24-25, 25-26, 27-28, 30) The trial court allowed this evidence because it supposedly established the motive for the assault: that Wagner

disrespected Stredicke by sleeping with his wife.⁷ (04/13/15 RP 132, 143; 04/14/15 RP 5-8)

Cases involving gang affiliation evidence are instructive. Because of the grave danger of unfair prejudice, evidence of gang affiliation is inadmissible unless the State establishes a sufficient nexus between the defendant's gang affiliation and the crime charged. See State v. Campbell, 78 Wn. App. 813, 901 P.2d 1050 (1995). Evidence of gang membership is inadmissible when it proves no more than a defendant's abstract beliefs. Dawson v. Delaware, 503 U.S. 159, 165, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992) (gang membership inadmissible to prove abstract belief because it is protected by constitutional rights of freedom of association and freedom of speech); Campbell, 78 Wn. App. at 822.

In this case, the trial court abused its discretion when it admitted evidence of skinhead affiliations and practices because the evidence was not necessary to prove a material issue in the case and the probative value was slight in comparison to its

⁷ A trial court's decision to admit evidence is reviewed for an abuse of discretion. State v. McBride, 74 Wn. App. 460, 463, 873 P.2d 589 (1994). The court abuses its discretion if there are no tenable grounds for its decision. State v. Tharp, 27 Wn. App. 198, 206, 616 P.2d 693 (1980).

potential for prejudice.

First, the evidence was totally unnecessary to prove a motive for the assault on Wagner. The jury certainly could have grasped the idea that Stredicke was angry at Wagner for sleeping with his wife, and that McKittrick was angry that Wagner had been disrespectful to his girlfriend and friends. This is certainly not the first time that infidelity has led to violence, or that a group of drunk men have settled their differences with a physical fight. The State could have easily established a motive without the skinhead evidence.

Any probative value was slight at best, but the potential for prejudice was quite high. Evidence of unpopular beliefs and associations is prejudicial to a defendant. See Scott, 151 Wn. App. at 526 (evidence of gang affiliation is considered prejudicial); United States v. Roark, 924 F.2d 1426, 1430-34 (8th Cir. 1991) (gang affiliation causes jurors to “prejudge a person with a disreputable past, thereby denying that person a fair opportunity to defend against the offense that is charged”). Admission of such evidence also implicates a defendant’s constitutional rights of freedom of association and freedom of expression. See State v. Monschke, 133 Wn. App. 313, 331, 135 P.3d 966 (2006) (citing Texas v.

Johnson, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)) (the First Amendment protects an individual's right to hold and express unpopular views and to associate with others who share that viewpoint). Thus, there was a danger that the jury would view Elliser as a bad person with anti-social or violent tendencies, and that the jury would feel compelled to punish him for holding such unpopular or offensive views. And testimony that skinheads resolve their differences with violence would tend to make the jury believe that Elliser and McKittrick were merely acting in conformity with their propensity for violence. This is exactly what ER 404(b) is designed to prevent.

Without a strong showing that the evidence regarding skinhead beliefs and associations was necessary to establish Elliser's or McKittrick's motive, the evidence should not have been admitted. The admission of the evidence was improper, unnecessary, and highly prejudicial. Elliser's convictions should therefore be reversed.

D. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the “substantially prevailing party” on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is “a matter of discretion for the appellate court,” which may “decline to order costs at all,” even if there is a “substantially prevailing party.” Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the “substantially prevailing party” on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal “is permissive,” so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the

party seeking costs establishes that they are the “substantially prevailing party” on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Elliser’s case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Elliser owns no property or assets, has no savings, and has no job and no income. (CP 430) Elliser will be incarcerated for the remainder of his life, and already owes at least \$10,000.00 in previously ordered LFOs. (CP 430-31) Based on these facts, the trial court declined to order any non-discretionary LFOs at sentencing in this case. (CP 414; 08/21/15 RP 86) Thus, there was no evidence below, and no evidence on appeal, that Elliser has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Elliser is indigent and entitled to appellate review at public expense. (CP 424-25) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an

order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016). Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that Elliser's financial situation has improved or is likely to improve. Elliser is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

VI. CONCLUSION

There was no evidence that Elliser was a part of or knew of any plan to assault Wagner. The State's evidence showed that, at

most, Elliser was simply present and failed to prevent McKittrick's assault on Wagner. This evidence cannot and does not establish that Elliser acted as McKittrick's accomplice. The State's evidence also failed to establish that Elliser personally assaulted Wagner because the evidence that there was a second assault is equivocal and does not show, beyond mere conjecture, that Elliser stabbed Wagner. Accordingly, Elliser's murder and assault convictions must both be reversed and dismissed with prejudice.

Alternatively, Elliser's assault conviction must be reversed because the State offered two distinct acts to establish this crime, but the court failed to instruct the jury that they must unanimously agree on which act was proved. Furthermore, the trial court's decision to allow minimally probative but highly prejudicial skinhead evidence requires a new trial. And finally, this court should also decline any future request to impose appellate costs.

DATED: June 24, 2016

A handwritten signature in black ink, reading "Stephanie Cunningham". The signature is written in a cursive, flowing style.

STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Eric Michael Elliser

CERTIFICATE OF MAILING

I certify that on 06/24/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Eric M. Elliser, DOC# 804911, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

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